IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 126 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE D.H.WAGHELA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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MUSTAKALI MAHMEDBHAI SHAIKH & 4 - Applicant(s)
Versus
STATE OF GUJARAT & 113 - Respondent(s)

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Appearance :
MR M.IQBAL A SHAIKH for Applicant(s) : 1 - 5.MR PURVISH J MALKAN for Applicant(s) : 1 - 5.
Mr H.L. Jani, Addl.PUBLIC PROSECUTOR for Respondent(s) : 1,
Mr Vijay Patel for HL PATEL ADVOCATES for Resp(s) : 2 - 3, 6,10 - 11, 40, 44, 47, 49, 52, 58, 69, 84, 87,98 - 100, 102, 105, 111,
None for Respondent(s) : 4 - 5,7 - 9,12 - 39,41 - 43,45 - 46, 48,50 - 51,53 - 57,59 - 68,70 - 83,85 - 86,88 - 97, 101,103 - 104,106 - 110,112 - 114.

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CORAM : HONOURABLE MR.JUSTICE D.H.WAGHELA

Date : 15/03/2007

ORAL JUDGMENT

1. Being aggrieved by the rejection of their application by order dated 15.2.2005 of the learned

Additional Sessions Judge, Mehsana in Sessions Cases No. 77 of 2004 and 78 of 2004, the petitioners, original witnesses and aggrieved parties, have approached this court with a prayer to set aside that order and direct further investigation.

2. The factual backdrop about which there is no controversy is that, on 28.2.2002, communal riots had spread to village Umta of Taluka Visnagar where the mob of about 1500 to 2000 persons had indulged in rioting and arson and the police was required to open fire. People belonging to one community had had to flee or had to be rescued even as their homes and valuable goods worth lakhs of rupees were burnt, destroyed or damaged and two members of that community were alleged to have been killed. Pursuant to the complaint being CR. No.I-61 of 2002 dated 1.3.2002 registered at the instance of Assistant Sub Inspector in Visnagar Police Station, investigation was carried out and charge sheets were submitted in the court, resulting into Sessions Case Nos. 77 of 2004 and 78 of 2004 wherein 37 and 76 persons were accused of different offences including the offence

under section 147, 148 read with section 149, section 307, 302, 436, 427 and 337 read with section 147, section 201 read with section 149 and section 295 of Indian Penal Code, 1860 and both the cases were being tried together. After examination of no less than 36 witnesses, the petitioners herein submitted the application exh.74, making the grievance, ***inter-alia,*** that the offences were not properly investigated, that several persons who were not living at the relevant time were shown as witnesses, that the dead bodies or the remains thereof were not discovered or recovered by the investigating agency and that the household goods and articles which were alleged to have been looted or damaged were not recovered and hence further investigation was required to be ordered. That application Exh. 74 was heard and decided on the same day by the handwritten order which is not fully legible and of which the typewritten copy annexed to the application is admittedly incorrect. However, as far as that impugned order could be deciphered, it appears that the learned Sessions Judge doubted the locus standi of the applicants and avoided detailed discussion of

the evidence under the apprehension of affecting the plea or defence of any of the parties; but recorded the finding that there were lapses in the police investigation. The impugned order was concluded with the remarks that, since new construction had come up at the place and premises where the alleged offences were committed, there was no chance of collecting or tracing out any further material. The impugned order and reproduction thereof leaves a lot to be desired.

3. Challenging the aforesaid order the petitioners have submitted in their petition that one Siphai Motekhan Misri Khan and Siphai Babbalkhan Dosabhai whose statements were recorded by police on 04.04.2002 were expired long back on 18.01.1989 and 23.11.1993 respectively and Siphai Adalkan Bastikhan, Shaikh Valimohmad Sultanbhai and Ismalbhai Kasambhai were also not surviving when their statements were supposed to have been recorded. It is averred that the investigating agency had not tried to recover remains of the deceased victims and no weapons were recovered from the accused persons. Similarly, the material looted by the accused persons on 28.2.2002

were also not recovered as muddamal articles and no police remand was sought by the investigating agency for that purpose. It was, on that basis, submitted that the application Exh.74 was required to be allowed and further investigation was required to be carried out by an independent and competent officer.

4. Learned counsel Mr. M.I.A. Shaikh, appearing for the petitioners relied upon judgment of this Court (Coram: M.B. Shah, J., as His Lordship then was) in ***Surendrabhai Babuhai Patel v, State of Gujarat*** (1985 GLH 299) wherein, after relying upon judgments of the Supreme Court in ***State of Bihar v. J.A.C. Saldenna (AIR 1980 SC 326*** and in ***Tula Ram v. Kishore Singh (AIR 1977 SC 2401),*** it was held that there was no reason why the Court should not have the power to direct the authority to make further report under section 173 (8) of the Code of Criminal Procedure. He also relied upon the judgment dated 12.10.2004 of this Court (Coram: C.K. Buch, J.) in ***Shaikh Madinabibi Mustafabhai v. State of Gujarat*** in Criminal Revision Application No.94 of 2004 and anr. in support of the submission that the application of

the petitioners could not have been dismissed on the plea of locus standi and the present revision application, upon the applicants being aggrieved by the impugned order, was also maintainable.

4.1. Learned counsel relied upon recent judgment of the Supreme Court in ***Hasanbhai Valibhai Qureshi v. State of Gujarat and Ors.*** (2004 AIR SCW 2063) wherein the learned Sessions Judge had already framed charge and the trial court was held to be free to add to or alter the charge, if the exigencies of the case so warranted. On the issue of further investigation, it was observed that the hands of the investigating agency or the court should not be tied down on the ground that further investigation may delay the trial, as the ultimate object was to arrive at the truth. It is clearly held in para 12 of the judgment that it is open to the police to conduct proper investigation even after the court took cognizance of any offence on the strength of a police report earlier submitted and it is further held that, if there were necessity for further investigation, the same can certainly be done as prescribed by law and

the likelihood of delay in conclusion of the trial should not stand in the way of further investigation, if that would have helped the court in arriving at the truth and do real and substantial as well as effective justice.

5. Learned counsel for some of the accused persons, Mr Vijay H. Patel, vehemently argued that the application for further investigation was made with the ulterior motive of delaying the trial while more than 100 accused persons were facing the trial since several years and about 38 witnesses were already examined. He submitted that even as the statements and reports of investigation dated 14.9.2002 and 27.10.2003 were submitted in the court and the petitioners were represented by their own advocates, no grievance was made for three years about incorrect statements having been recorded by the investigating agency. He further submitted that the accused persons were likely to suffer prejudice and harassment, even as they were on bail, if investigation were reopened and the trial were to be delayed. He relied upon recent judgment of this

court (Coram : J.R. Vora, J.) in ***Miteshkumar Rameshbhai Patal v. State of Gujarat & Anr.*** (2006 (3) GLR 1935) and cited the legal proposition laid down therein that no court can direct further investigation under section 173 (8) of the Criminal Procedure Code after taking cognizance upon police report.

6. Learned APP appearing for the State submitted that the alleged offences were properly investigated and the Investigating Officer had taken all the necessary steps for collecting the material and evidence after which two reports of investigation as aforesaid were submitted to the court in September, 2002 and October, 2003. Pursuant to the earlier order dated 25.7.2005 herein, the statements of the petitioners recorded by the police during the investigation along with few panchnamas and applications made to the court as well as some reports of Forensic Science Laboratory were submitted for perusal and in support of the argument that the investigating agency had pursued the matter as far as it could in the prevailing circumstances. It was

pointed out that a bone found during investigation was sent for FSL report but it was found not to be bone of any human body; and blood samples collected from another spot where another victim was stated to have been assaulted with deadly weapons was, on analysis found to be human blood but no further evidence of killing of any person could be found. He however, fairly conceded that, if the court were to find serious lapses in the investigation and/or further investigation, the State shall abide by the order and submit a report of further investigation as expeditiously as practicable.

7. It was seen from bare reading of the impugned order that the application of the petitioners was rejected by a perfunctory reference to the averments, without appreciating the serious grievance and mainly on the ground that new construction had come up at the places of alleged incidents. It was seen from the few papers of investigation produced and perused before this court by learned APP that lack of serious investigation for tracing out the dead bodies or remains thereof, of

the persons alleged to have been killed, as also the lack of attempt at tracing out valuable goods alleged to have been looted from the houses of victims of the offences was apparent and investigation of death of one of the victims had stopped at lifting the samples of blood and getting analysis report thereof. Learned APP had submitted in defence of the investigating agency that some of the persons named by the victims were nabbed, arrested and taken into police custody for one day for the purpose of investigation. However, the applications for remand for a further period of number of suspected accused persons were summarily rejected by the court and, therefore, the investigation was admittedly handicapped, particularly during the period when the police force was under pressure to control the riots and restore law and order.

8. In view of the above facts and submissions, it clearly emerges from the record that there were several serious lapses and lacunae in the investigation carried out before submission of the charge sheet and even without an application in or

order of any court, further investigation was required to be carried on, in exercise of powers entrusted to the investigating agency under the provisions of sub-section (8) of section 173 of the Criminal Procedure Code, 1973 (for short, "the Code"). As observed by Supreme Court in ***Hasanbhai Valibhai Qureshi*** (supra), the ultimate object of investigation and trial is to arrive at the truth and the prospect of delay in conclusion of the trial must not come in the way of unearthing the necessary evidence and the truth as far as it is possible and admissible. The judgment of this court in ***Miteshkumar Rameshbhai Patel (supra)*** heavily relies upon earlier judgment of the Supreme Court in ***Randhir Singh Rana v. State (Delhi Administration)*** as reported in 1997 (1) SCC 361 wherein it was observed that a Magistrate, after taking cognizance of an offence on the basis of police report and after appearance of the accused cannot, of his own, order further investigation in the case. In the facts of that case, the trial had reached to the stage of recording of deposition of 85 witnesses out of 96 witnesses. Relying upon that judgment in ***Randhir***

Singh Rana (supra) the court held that after taking cognizance, the court cannot direct the police, on its own, to investigate further under section 173 (8) of the Code.

9. It was submitted and noticed that the Supreme Court had, while ordering investigation under section 173 (8) of the Code in ***Zahira Habibulla H Sheikh & Anr v. State of Gujarat & Ors.*** (2004) 4 SCC 158) observed in para 78 as under:

> ***"78. Since we have directed retrial, it would be desirable to the inivestigating agency or those supervising the investigation, to act in terms of section 173 (8) of the Code, as the circumstances seem to or may so warrant. The Director General of Police, Gujarat is directed to monitor reinvestigation, if any, to be taken up with the urgency and utmost sincerity, as the circumstances warrant."***

It was further observed in para 79 that sub-section (8) of section 173 of the Code permits further investigation, and even dehors any direction from the court as such, it is open for the police to conduct proper investigation, even after the court took cognizance of any offence on the strength of a police report earlier submitted.

10. Therefore, in the peculiar facts and following the ratio of judgments of the Supreme Court in ***Hasanbhai V. Qureshi (supra)*** and ***Zahira H Sheikh (supra)*** as discussed hereinabove, the petition is **allowed,** the impugned order dated 15.2.2005 below Exh. 74 is set aside and respondent No.1 is directed to hold further investigation and submit report of such further investigation as expeditiously as practicable. It would be in the discretion of the State Government to entrust further investigation to an officer of appropriate rank. However, it was suggested and conceded at the bar that further investigation must be carried out by an independent and competent officer under the supervision of the District Superintendent of Police and the report may

be submitted to the court, as far as practicable, on or before **15.5.2007.** Such officer or the D.S.P. concerned may receive representations proposed to be made on behalf of the petitioners on particular aspect of investigation. Further proceedings of the Sessions Cases No. 77 of 2004 and 78 of 2004 pending in the court of learned Additional Sessions Judge, Mehsana shall have to remain stayed till the report of further investigation is submitted. **Rule is made absolute accordingly** with no order as to costs. Direct Service is permitted. The registry of this Court is directed to place before the Standing Committee or the Committee reviewing performance of Fast Tract Courts, the impugned order with a properly typed copy thereof.

sd/-
[D. H. Waghela, J.]

msp